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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 246

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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vs.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Elgin, Joliet and Eastern Railway Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on May 4, 1962.

OPINIONS BELOW.

The memorandum of the district court (App. 467-70) is reported at 196 F. Supp. 158, 166 (N. D. Ill. 1961). The opinions of the Court of Appeals are reported at 302 F. 2d 540, 545 (7 Cir. May 3 and 4, 1962) (See Appendix A, *infra*, pp. A-1—A-9, for the opinion of May 4, 1962, to which this Petition relates).

JURISDICTION.

The judgment of the court of appeals was entered May 4, 1962 (Appendix A, *infra*, p. A-10). Petition for rehearing was denied by the Court of Appeals on June 7, 1962. The jurisdiction of this court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the distinctive Railway Labor Act phrase "rates of pay, rules, or working conditions" requires that the granting of non-contributory pensions shall be subject to the duty of mandatory collective bargaining and the right to strike?

2. Whether railroad brotherhoods lawfully may strike for increased non-contributory pensions for retired persons who are not employees and for whom the brotherhoods have no power to bargain under the Railway Labor Act?

3. Whether railroad brotherhoods may lawfully strike during the pendency of emergency mediation by the National Mediation Board pursuant to Section 5 First of the Railway Labor Act?

4. Whether, under Section 5 First of the Railway Labor Act, which provides for emergency mediation "at any time," the National Mediation Board has power, in a major dispute over changes in collective agreements, to invoke emergency mediation anew after termination of its normal mediatory functions under that section?

5. Whether, under Section 5 First of the Railway Labor Act, which authorizes and governs the mediatory functions of the National Mediation Board, the Board also derives power to conduct informal operations purporting not to have the statutory consequences of Section 5 First?

6. Whether, when the injunction bond is not conditioned

to provide for attorneys' fees, defendants in a labor injunction suit are entitled to recover attorneys' fees under the bond or Section 7 of the Norris-LaGuardia Act?

STATUTES INVOLVED.

Sections 1, 4, 5, 7, 9 and 13 of the Norris-LaGuardia or Anti Injunction Act of 1932, 47 Stat. 70, 29 U. S. C., §§ 101, 104, 105, 107, 109, 113 and Sections 1, Fifth, 2, 5 and 6 of the Railway Labor Act as amended, 44 Stat. 577, 48 Stat. 1185; 49 Stat. 1189; 54 Stat. 785, 62 Stat. 991, 63 Stat. 107, 45 U. S. C. §§ 151, 151a, 152, 155, 156, are set forth in Appendix B hereto, *infra*, pp. B-1–B-17, and relevant excerpts are quoted in the discussion, *infra*.

STATEMENT.

Elgin, Joliet and Eastern Railway Company filed a suit on May 19, 1961, in the district court seeking to enjoin the Brotherhood of Railroad Trainmen, Brotherhood of Locomotive Firemen and Enginemen and the Order of Railway Conductors and Brakemen (hereinafter "brotherhoods") from striking on the following day over certain collective bargaining demands. The district court entered a temporary restraining order on May 19, 1961. This order was continued in effect by agreement pending final action by the court after a hearing on the merits. Such a hearing was held, and thereafter, on June 21, 1961, the court denied petitioner's application for a permanent injunction and dismissed the complaint.

On June 22, 1961, petitioner filed its notice of appeal and on the same day the district court entered an order under Rule 62(c), enjoining the brotherhoods from striking during the pendency of that appeal (App. 469). The brotherhoods then appealed from the order granting the Rule 62(c) injunction (App. 472, 477).

The court of appeals handed down separate opinions, the first on May 3, 1962, reversed the order granting the injunction pending appeal, and the second on May 4, 1962, affirmed the order denying a permanent injunction. Two petitions for writ of certiorari have been filed by the petitioner. This petition seeks a review only of the order affirming the denial of the permanent injunction. Another petition filed contemporaneously with this petition seeks a review of the court of appeals reversal of the issuance of the injunction pending appeal.

REASONS FOR GRANTING THE WRIT.

1. The court of appeals has decided important questions of federal railway labor law which have not been, but should be, settled by this court.

A. The court of appeals' decision, for the first time in the railroad industry, extends to the subject of non-contributory pensions the duty of mandatory bargaining and the right to strike, thereby ignoring the history and custom of the industry, and the congressional choice of language which distinctively expresses the duty to bargain governing this unique industry.

B. The mandatory bargainability of pensions and similar fringe benefits is a matter of grave importance to the national economy and to the railroad and airline industries, employees, and labor organizations.

C. The question of the right to strike for retired persons—nonemployees who are not represented by the striking brotherhoods—is a novel matter of nation-wide importance under the federal labor laws.

D. The legal rights and duties governing the National

Mediation Board, railroads and railway labor organizations in emergency mediation under Section 5 First of the Railway Labor Act urgently require a uniform and clarifying interpretation to correct the uncertain, conflicting and confused state of the existing law.

2. The decision of the court of appeals fails to give proper effect to the decision of this court in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 354, 389 (1935), which held that to place the burden of pensions for retired persons upon railroads was a taking of property without due process of law.

3. The decision of the court of appeals is in conflict with the decision of the court of appeals for the 8th Circuit in *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 147 F. 2d 246 (8th Cir.), *cert. denied* 325 U. S. 852 (1945), in allowing the brotherhoods the recovery of attorneys' fees under Section 7 of the Norris-LaGuardia Act.

ARGUMENT.

I. BARGAINABILITY OF NON-CONTRIBUTORY PENSIONS.

1. The case at bar is the first to hold that non-contributory pensions, as demanded by the brotherhoods, are the subject of mandatory bargaining within the Railway Labor Act. Yet in but one sentence[1] the court of appeals repudiated both sixty years of railroad custom and the congressional effort, in the enactment of the Railway Labor Act, to establish a special statute for the unique problems of the railroad industry.

The court of appeals has ventured, in a single sentence, into an area which no other court ever reached—the mandatory bargainability of so-called fringe benefits under the Railway Labor Act. This area of federal law is an extremely important one of far-reaching economic and social consequences. It deserves a comprehensive treatment which will govern and enlighten the industry, and which will guide the courts when faced with such problems in the future.

2. The governing choice of language used by Congress in Sections 2 First, 2 Seventh and 6(a) of the Railway Labor Act specifies "*rates of pay, rules, or working conditions.*" 45 U. S. C. §§ 152, 156 (Emphasis added). In contrast, the National Labor Relations Act, § 8(d), refers to "wages, hours, and other terms and conditions of employment" and § 9(a) refers to "collective bargaining in respect to *rates of*

1. "In spite of the difference in terminology between the National Labor Relations Act and the Railway Labor Act, we think the conclusion reached in the *Inland* case is applicable here." (Appendix A, *infra*, p. A-6). The reference is to *Inland Steel Co. v. National Labor Relations Board*, 170 F. 2d 247 (7th Cir.), *cert. denied*, 336 U. S. 960 (1948).

pay, wages, hours of employment, or other conditions of employment." (29 U. S. C. §§ 158, 159.) (Emphasis added.)

Outside the railroad industry, under the National Labor Relations Act language, it seems settled that pensions are a lawful subject of mandatory collective bargaining. *Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247 (7th Cir. 1948), *cert. denied* 336 U. S. 960 (1949). However, in the *Inland* decision the court distinguished the Railway Labor Act situation as being "quite different." (170 F. 2d 247, 254.)[2]

The difference between the Railway Labor Act "rates of pay, rules, and working conditions" and the National Labor Relations Act "wages, hours, and other terms and conditions of employment" is substantial, not purely formal. It reflects the sharply defined distinction between usage and custom in the railroad industry, on the one hand, and in the non-railroad industry, on the other. This distinction should be controlling in this case.

It is well established that industry practice is often determinative in deciding questions of bargainability. For example, a majority of this Court recently wrote that "the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees themselves." *Order of Railroad Teleg-*

2. "In this connection, we think it is pertinent to note that in the Railway Labor Act the bargaining language was quite different from that of the instant legislation. There, it read, 'rates of pay, rules, or working conditions.' Here, it reads, 'rates of pay, wages, hours of employment, or other conditions of employment.' A comparison of the language of the two Acts shows that Congress in the instant legislation must have intended a bargaining provision of broader scope than that contemplated in the Railway Labor Act. Certainly the term 'wages' was intended to include something more than 'rates of pay.' Otherwise, its use would have served no purpose. Congress in the instant legislation used the phrase, 'other conditions of employment,' instead of the phrase, 'working conditions,' which it had previously used in the Railway Act. We think it is obvious that the phrase which it later used is more inclusive than that which it had formerly used." 170 F. 2d 247, 254, 255.

raphers v. *Chicago & North Western R. ...* 362 U. S. 330 (1960). And the Court in *National Labor Relations Board* v. *American Nat'l Insurance Co.*, 343 U. S. 395 (1952), was strongly influenced by the fact that "bargaining for management functions clauses is common collective bargaining practice." 343 U. S. at 407. Similarly, in discussing the NLRB's position that irrespective of industry custom an employer must *agree* to freeze a work schedule standard, the Court declared (343 U. S. at 408):

> Bargaining for more flexible treatment of such matters would be denied employers even though the result may be contrary to common collective bargaining practice in the industry. The Board was not empowered so to disrupt collective bargaining practices. On the contrary, the term 'bargain collectively' as used in the Act 'has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States.' *Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 346 (1944).

3. What, then, is the industry practice? The distinction could not be clearer. In the non-railroad industry, pension plans which are products of collective bargaining are common. U. S. Department of Labor Bulletin No. 1284, *Pension Plans Under Collective Bargaining* (1959.) (This recent study expressly excludes the Railway Labor Act industries, railroads and airlines.)

By contrast, however, the custom in the railroad industry is established that although supplementary pensions are common, they are *not* customarily subject to collective bargaining. In October, 1960, among the 27 Class I line haul railroads in this country each having more than 10,000 employees as of 1957, and the Pullman Company and the Railway Express Agency, 26 companies had at least one supplementary pension plan. *Not one* supplementary pension plan had come into existence through or was then

subject to collective bargaining between management and labor. These companies employed approximately 80% of all railroad employees in 1957. See *Supplementary Pension Plans in the Railroad Industry, A Digest of Representative Plans, for the Subcommittee on Railroad Retirement of the Committee on Labor and Public Welfare*, United States Senate, 86th Cong., 2d Sess. (1961), pp. v-vii. Data from this document is summarized in Appendix C, *infra*. The entire document was received in evidence in this case, without objection, as Brotherhood of Railway Trainmen Exhibit 4.

The railroad industry in general simply does not consider that these pension plans *are or should be* a subject for joint determination by management and labor. Industry practice instead clearly recognizes that, because of the complex nature of pension plans, unilateral establishment and administration of supplementary plans by the carriers alone is essential.[3]

4. Congress itself gave approval to this characteristic of the industry in 1935, *after* enactment in 1926 of the Railway Labor Act phrase "rates of pay, rules and working conditions" and after the 1934 RLA amendments, which did not change the phrase. In the Railroad Retirement Act of 1935, Section 7 provided, in part, that:

> It is recognized that *existing individual carrier . . pension plans are wholly at the option of the carrier*

3. "The type of product which a company chooses to make, its price policies, the location of its plants, its choice of production processes and the assignment of workers are matters of practical importance to its employees. Nevertheless, it is generally agreed that management should have exclusive responsibility for such matters without the intervention of the union. Sometimes *pension plans*, merit increases, subcontracting, and the scheduling of work are treated as management's responsibilities; in other businesses they are regarded as appropriate for joint management-union determination." Cox and Dunlop, *Regulation of Collective Bargaining By The National Labor Relations Board*, 63 Harvard L. Rev. 389, 401 (1950). (Emphasis added.)

> unless in any case express provision is made otherwise, and no restriction is imposed under this chapter upon such plans * * * (49 Stat. 971 (1935).) (Emphasis added.)

The April, 1951, Report of the Temporary Emergency Railroad Wage Panel to the Administrator of the Economic Stablization Agency recognized that Congress in the Railroad Retirement Act has occupied the field of pension benefits for retired railroad employees, to the exclusion of collective bargaining over such benefits.[4]

This plainly accounts for the overwhelming custom and practice in the railroad industry not to make "fringe benefits" subject to collective bargaining.

Furthermore, the *Inland* precedent is inapposite, for that case held that the contributory plan which was there involved fell within the statutory terms "wages" and "conditions of employment," *neither of which appear in the Railway Labor Act.* The court expressly distinguished "rates of pay" by stating that "Certainly the term 'wages' was intended to include something more than 'rates of pay'." (170 F. 2d 247, 255.)

From the standpoint of the meaning of language, the Railway Labor Act does not mention "pensions" nor contain a term which is broad enough to be so construed. Clearly pensions are neither "rules" nor "working con-

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4. The panel, consisting of William M. Leiserson, Lloyd K. Garrison and Frank M. Swacker, recommended a three year moratorium on rates of pay. In the course of this report the panel stated:

> "If prices are held, the railroad workers will be precluded for three years from seeking wage changes. This will be an unprecedented event in that industry, and one which the railroads, as well as the President's representative sought in the negotiations. The limitation upon the employees cannot be circumvented by pressure for 'fringe benefits' (*pensions* and the like), for these are, practically speaking, either regulated by or provided for by statute, and *changes cannot be made without resort to Congress.*" (Emphasis added.)

ditions." It is equally clear that they are not "rates of pay." There are no "rates" and no "pay" involved.

First, the noncontributory plan in the case at bar must be sharply distinguished from a contributory plan, such as was considered in the *Inland* case. In the instant case the carrier would bear 100% of the cost of the plan, and no amount per hour or day would be deducted from his pay and contributed by the employee during his working years. Thus there is no effect on the dollars and cents hourly rate. Moreover, such hourly rates of pay are negotiated separately from and are no part of the negotiations which led to the dispute at bar.

Second, the *Inland* analysis reasoned that every day an employee works his financial status is enhanced to the extent that his pension benefits increase, and that he works under a pledge from the company that certain benefits would be his upon reaching retirement. Thus, there is the certainty of payment which characterizes the contributory pension plan. However, this reasoning does not apply to the noncontributory plan. There is no certainty of benefits. Noncontributory plan benefits are not vested. No compensation characteristics exist, since during the working years the employee has no vested rights to noncontributory pension benefits. Section VII (3) of plan II-B, sought by the three defendants, provides that:

> No Employee prior to his retirement * * * shall have any right or interest in or to any portion of any funds which may be paid into any pension trust * * * and no Employee * * * shall have any right to pension benefit except to the extent provided in this Agreement. (App. 436.).

Thus, the employee who works for a carrier for a number of years and quits to take other work has no right to a pro-rata pension from the carrier. This is typical

among railroad workers. Many workers who enter railroad employment are casual workers who stay for only a short time. For example, of 171,000 new railroad workers in 1949, only 18,300, or 11%, were still employed in 1958. (*1960 Railroad Retirement Board Annual Report* 59 (1961).) Similarly, the employee who is discharged for cause, who dies before he is eligible or whose Railroad Retirement Act benefits cancel private pension benefits receives no non-contributory pension. This cannot be reconciled with the *certainty* and *predictability* of "rates of pay."[5]

5. In the statutory inquiry, it is irrelevant that the plaintiff railroad once signed a pension plan into its collective agreements in a prior negotiation in 1957 (App. 133-136, 201, 344, 345). Temporary actions by isolated individuals cannot be allowed to forever modify statutory requirements. Pensions, as any other subject not within mandatory bargaining, as a matter of law may be withdrawn by either party at the termination of the agreement even though both parties have once agreed. To ignore this principle would nullify the carefully drawn and well settled distinction this Court has made between mandatory and permissive bargaining, in *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U. S. 342, 349 (1958): "* * * it is lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without * * *."

II. BARGAINING FOR BENEFITS FOR RETIRED PERSONS.

1. If railroad brotherhoods may bargain and attempt to strike for benefits for retired persons, in the manner demonstrated in the case at bar, a major alteration in

5. *McMullans* v. *Kansas, Oklahoma & G. Ry. Co.*, 229 F. 2d 50 (10th Cir. 1956), cited as authority by the court of appeals, was not a decision passing on the bargainability of non-contributory pensions.

collective bargaining powers and practices will have been created. Such alterations in the established institutions of an entire industry should not be created lightly or by indirection, as the court of appeals has done. The issue deserves candid, deliberative attention, and an instructive opinion.

2. Retired persons are not employees within the meaning of the Railway Labor Act. The brotherhoods had no power or right to bargain and strike for them, for the Railway Labor Act provisions fixing collective bargaining rights and duties are predicated on the existence of the employment relationship and the "craft or class" concept of representation.

Section 1 Sixth exemplifies this underlying principle in defining representative to mean "any person or * * * labor union * * * designated * * * by * * * *employees*, to act *for* * * * *them*." (Emphasis added.) Conversely, only persons who have the status of employees are statutorily empowered to associate and organize. "Employees shall have the right to organize * * * collectively * * *." (Railway Labor Act, § 2 Fourth.) In addition, it is only the category of employed individuals who are given rights under the Railway Labor Act to engage in collective action with employers. "*Employees* shall have the right to * * * bargain collectively through representatives of their own choosing." (Railway Labor Act, § 2 Fourth.) (Emphasis added.) No other group or class is accorded that right. Only "employees" may have their interests in rates of pay, rules, and working conditions handled by representatives. Only "employees" have a voice in the selection of representatives.

To conclude that the 102 retired persons involved in the instant case are "employees" does substantial violence both to the plain language of the Act and to its express

statutory purposes. The relevant portion of the definition is as follows:

> The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service). (§ 1 Fifth.)

Mr. Donald R. Richberg, principal draftsman of the Act and counsel at the time of its enactment for the organized railway employees (including the BRT, ORCB and BLFE) supporting H. R. 718, interpreted the bill's definition of employee (identical to that finally enacted in 1926) as follows:

> Of course, that does not go to the extent of holding that relations which have terminated by both parties, for example, permits them to remain in the relation of employer and employee after a long period of time. (Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives, 69th Congress, First Session, on H. R. 718, p. 397 (1926).)

The fact that these retired persons no longer are "employees" is shown conclusively by the United States Government forms which the plaintiff's employees voluntarily sign when they retire from the railroad and apply for pensions under the Railroad Retirement Act. (App. 310-312.) They state that services are terminated and all rights relinquished. The express, written understanding between retired persons and the railroad proves that retired persons are not "employees" within the meaning of the Railway Labor Act. They perform no "service" for the plaintiff after their retirement. They are assigned no responsibilities on behalf of the plaintiff. They are under no instructions from the plaintiff. They have no duty whatsoever to obey the plaintiff. The plaintiff has no "authority to supervise and direct the manner of renditions of * * * service."

3. The decision most directly in point is *National Council, Ry. Patrolmen's Union* v. *Sealy*, 152 F. 2d 500 (5th Cir. 1945). That Court held that an employer had no duty to bargain with persons who do not fall within the statutory definition of "employee," and that such non-employees do not enjoy rights. Trustees of the city of Galveston, Texas, operated port facilities which included railroad switching tracks, wharves and warehouses. The operations of the switching tracks were subject to the Act, but the operations of the wharves and warehouses were not. The trustees employed certain policemen to serve as watchmen at the gates to the entire port district. These policemen thereafter brought a suit for a mandatory injunction to compel the city's trustees to treat and bargain with them as "employees" subject to the Act. The district court denied the injunction and the court of appeals affirmed.

The following decisions, although not dealing with retired persons, held unlawful a strike for persons not represented as employees by the striking union: *International Longshoremen's Ass'n* v. *National Labor Relations Board*, 277 F. 2d 681 (D. C. Cir. 1960); *Order of Railway Conductors & Brakemen* v. *Switchmen's Union*, 269 F. 2d 726 (5th Cir.), *cert. den.* 361 U. S. 899 (1959); *Switchmen's Union* v. *Southern Pacific Co.*, 253 F. 2d 81 (9th Cir.), *cert. den.*, 358 U. S. 818 (1958); *Brotherhood of Railroad Trainmen* v. *Smith*, 251 F. 2d 282 (6th Cir.), *cert. den.* 356 U. S. 937 (1958); *Douds* v. *International Longshoremen's Ass'n*, 241 F. 2d 278 (2d Cir. 1957); *Nashville, C. & St. L. Ry.* v. *Railway Employees' Dep't*, 93 F. 2d 340 (6th Cir. 1937), *cert. den.*, 303 U. S. 649 (1938).

4. Indeed, the brotherhoods' bargaining for retired persons under threat of strike, if it were deemed authorized by federal statute, would be the taking of plaintiff's property without due process of law. The original Railroad Retirement Act of 1934 purported to make eligible for

pensions all persons who were employed by the carrier *within one year prior to its enactment*. The retirement fund for payment of these pensions was to be created and sustained by compulsory contributions from the carriers. In this respect the carriers were expected to assume the burden of the cost of pensions to a class of persons from whom no future services might be expected. In *Railroad Retirement Board v. Alton R. R.*, 295 U. S. 330 (1935), the Court declared the 1934 Railroad Retirement Act unconstitutional in its entirety. It held in part that to place the burden of pensions for retired persons upon the carriers was wholly arbitrary and a taking of property from the carriers without due process of law.

Mr. Justice Roberts, writing the opinion for the majority of the court in the *Alton* case, in referring to that section of the Act which stated that all persons who were in carrier service within one year prior to the passage of the Act would be entitled to pensions whether employed or not, stated:

> This clearly arbitrary imposition of liability to pay again for services long since rendered and fully compensated is not permissible legislation. The court below held the provision deprives the railroads of their property without due process, and we agree with that conclusion. (295 U. S. 330, 354.)

Mr. Chief Justice Hughes, for the minority, stated:

> I agree with the conclusion that the requirement that the carriers shall pay retiring allowances to such persons is arbitrary and beyond the power of Congress. (295 U. S. 330, 389.)

This rule of law has not been questioned seriously since the *Alton* case.[6]

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6. All nine members of the Court concurred in this aspect of the case. See 49 Harv. L. Rev. 1 (1935). The subsequent modifications of the Commerce Clause views of the *Alton* case majority have not affected its unanimous due process holding

If it is "beyond the power of Congress," clearly it is beyond the power of the Brotherhoods in the case at bar, to force similar provisions upon the plaintiff with the threat of strike.[7]

5. The court of appeals characterized its holding on this point as an affirmance of a finding of fact. In reality the issue is a question of law—does the undisputed course of bargaining conduct by the defendant brotherhoods amount in law to bargaining and threatening to strike for retired persons? That this issue is a legal judgment, an ultimate conclusion as to the legal consequences of particular, uncontroverted facts, is shown by the fact that the trial court ruled on the issue as a matter of law in Conclusion of Law Number 4. The matter *is* one of law, requiring a judgment which calls for application of the statutory provision for collective bargaining, evaluation of the pertinent policy considerations, and effectuation of the congressional intent.[8]

The court of appeals' attempt to pass the issue as a mere question of fact evades an open answer to the question un-

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7. Cf. Mr. Justice Brandeis in *Dorchy v. Kansas*, 272 U. S. 306, 311 (1926):

> "The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose. * * * To enforce payment by a strike is clearly coercion. The legislature may make such action punishable criminally, as extortion or otherwise. * * * Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike."

8. The trial court also made an ultimate conclusion of "fact" to the same effect, which it included among its Findings of Fact. See Findings of Fact No. 14 (App. 457), particularly its conclusory inferences: " * * * but such discussions were not *treated* by the officers of the defendant labor organizations as collective bargaining under the Railway Labor Act * * *" (Emphasis added).

avoidably posed, yet necessarily determines it by summary affirmation. Surely, the important legal issue of what constitutes bargaining cannot be so superficially evaded.

A brief summary of the record of the bargaining between the railroad and the brotherhoods will exemplify petitioner's contention. Demands for increased pensions for the 102 retired former employees in the case at bar were presented orally in the mediation session held February 23, 1961 (they were not listed in the original § 6 notices), and there was never any question that they were being made specifically for increased pensions for the class of individuals who had long since retired. (App. 95, 136, 131, 141, 144, 145.) These demands were *never withdrawn* during the bargaining conferences. The demands for increased pensions for retired persons never were presented in the bargaining conferences as an *alternative* proposal, acceptance of which would *not* be necessary for settlement. When all three unions listed all of their settlement demands and included increased pensions for the 102 retired persons, all of the items listed were presented as necessary for settlement. If settlement was not reached peacefully, the defendant Brotherhoods intended to conclude the issue by strike.

The defendants' failure to denominate specifically their strike as one for increased pensions for retired persons does not help them. The fact is that a strike was never mentioned because no mention was necessary. Everyone engaged in collective bargaining under the Railway Labor Act knows full well that there is always present the clear warning, sometimes expressed but always implied, that unless the carrier grants the unions' demands, a strike may ensue. It is this possibility of strike which assures that the employer will seriously consider unions' proposals. The only means of negativing the threat of a strike for bargaining demands is to expressly state that no strike is intended and

to withdraw the discarded demands from the proposals offered as settlement terms.

The fact that increased pensions for retired persons were not specifically listed on the strike ballot of the ORCB and BLFE cannot support the position that such increased pensions were not part of the objectives of the threatened strike. *None* of the specific sub-demands of the ORCB and BLFE were enumerated in detail on the strike ballot. (App. 446-450.) The strike authorization of the three unions acting jointly is equally general. (App. 313.)

III. EMERGENCY MEDIATION.

1. The court of appeals, in overruling, without reasons, petitioner's contention that the threatened strike was illegal because called during statutory emergency mediation, accorded summary treatment to a point of law which urgently needs clarification, explanation and interpretation. As the matter now stands under the court of appeals' opinion there is no way to ascertain the duties and the rights of parties in emergency mediation.

The district court in the case at bar held that even though emergency mediation was in progress an organization was free to strike where it had not consented to postpone the strike pending mediation. (Conclusions of Law Numbers 7 and 8 (App. 461).) On April 23, 1962, the district court in another case, *Pullman Co.* v. *Order of Railway Conductors and Brakemen*, 44 CCH Labor Cases ¶17,577 (N. D. Ill. 1962), held exactly the contrary.

In both cases the Board requested the organizations to defer strike action pending mediation conferences. In both cases the organizations agreed to participate in such conferences but refused to defer strike action. The district court in the instant case held that a strike would be legal. The court in the *Pullman* case held that:

> Defendants' refusal to postpone their threatened strike pending the efforts of the National Mediation Board to mediate a settlement of the dispute violated the Railway Labor Act. (44 CCH Labor Cases, ¶ 17,577, at p. 26,608.)

The other district court decisions which have coirsidered the legal effects of emergency mediation are not consistent and are not helpful. See *Pittsburgh & Lake Erie R. R.* v. *Brotherhood of Railroad Trainmen*, 179 F. Supp. 271 (W. D. Pa. 1959); *Chicago & North Western Ry. Co.* v. *Order of Railway Telegraphers*, 36 CCH Labor Cases ¶ 65,103, at p. 65,370 (N. D. Ill. 1958), *aff'd on other grounds*, 362 U. S. 330 (1960):

> In merely overruling petitioner's contentions without reasons, the court of appeals in its opinion of May 4, 1962, neither approved nor disapproved either district court analysis and gave no guidance on the problem. Its holding on this point will create confusion and uncertainty in the administration of emergency mediation for the Board, the trial courts and the railroad industry.

2. Section 5 First allows an NMB proffer of emergency mediation "in case any labor emergency is found by it *at any time*." (Emphasis added.) Following this, every procedural step after the proffer is mandatory as each step in Section 5 First is preceded by the word "shall". Thus, the board "shall use its best efforts, by mediation, to bring the parties to agreement." Even if such efforts are unsuccessful the board "shall at once" induce the parties to arbitrate. If arbitration is refused the board "shall" notify the parties that its efforts have failed, and for 30 days thereafter "no change shall be made" in prior agreements or practices.

The Board has no power to dispense with these statutory mandates, if it exercises its discretion and proffers its jurisdiction as it did in the case at bar. (App. 302.) Yet after

re-entering the instant controversy, the Board purported to act informally so to evoke none of the statutory duties of emergency mediation. (App. 304.)

It is a commonplace of federal administrative law that "* * * administrative tribunals are statutory creations and their rights, duties, powers and privileges are of statutory derivation." (Stason and Cooper, *Cases and Other Materials on Administrative Tribunals* 5 (3d Ed. 1957).) The governing statute in this case, the Railway Labor Act, is the sole source of NMB authority. A similar improvised, nonstatutory action by a federal agency was sharply criticized and found unlawful in *Wallach v. Securities & Exchange Commission*, 202 F. 2d 462 (D. C. Cir. 1953). The court stated:

> The Commission may be able to convince Congress that the improvised administrative procedure is preferable to the * * * procedure now provided by the Act. But until it does, we think the statutory provisions lead to no such absurd result as would warrant the Commission's superimposing its judgment upon that of Congress. (202 F. 2d 462, 464.)

Nothing in the Railway Labor Act expressly gives the NMB an extraordinary power to dispense with manifest congressional intention.

To read into the statute an election that the organizations may or may not strike in emergency mediation is wholly inconsistent with the objectives of the Railway Labor Act to avoid interruptions to commerce. To permit such a strike during mediation would also render nugatory Section 5 First of the Act, which provides that "the Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time." (45 U. S. C. § 155 First.) The statutory objectives would hardly be advanced by authorizing resort to self-help in the private interest just at the time when in a labor emergency the

public interest demands uncoerced deliberation under mediatory auspices.

Petitioner submits that certiorari should be granted to resolve this unclear but extremely important point of law. The proper resolution of this question should be that a strike during emergency mediation violates both the Railway Labor Act mediation provisions and the requirement under Section 2 First that all parties must "exert every reasonable effort to make and maintain agreements * * * and to settle all disputes * * * in order to avoid any interruption to commerce or to the operation of any carrier * * *."

IV. RECOVERY OF ATTORNEYS' FEES.

The summary ruling of the court of appeals with respect to the recovery of attorneys' fees in this case conflicts with the decision of the 8th Circuit, *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 147 F. 2d 246 (8th Cir.), *cert. denied* 325 U. S. 852 (1945) as well as federal principles uniformly recognized by this Court for almost a century. See, *e. g.*, *Oelrichs* v. *Spain*, 5 Wall. 211 (1872).

The *Donnelly* opinion concerned an appeal from a hearing to assess damages and expenses caused by the erroneous issuance and continuance of certain injunctive orders. Even though the injunction bonds, with one exception, did not provide for recovery of attorneys' fees, the defendants sought to recover attorneys' fees apparently on the theory that Section 7 of the Norris-LaGuardia Act by itself would support the action. In rejecting these contentions the court ruled that Section 7's requirement of a bond as a condition precedent directly contradicts the notion that the Act is self-executing. The court stated:

> We think the statutory requirement of a bond upon certain conditions in an amount to be fixed by the court

> is conclusive evidence of the legislative intention that the bond should be the evidence and measure of plaintiff's liability and defendant's protection. (147 F. 2d 246, 252.)

The court also held that the words of Section 7 could not be read into the bonds. Moreover, in pointing out that the defendants were not entitled to attorneys' fees simply because the decrees under which the bonds were given were erroneous, the court observed:

> The loss if any caused defendant by the errors of the court is *damnum absque injuria*, one of the unavoidable incidents of litigation to which parties are exposed. (147 F. 2d 246, 253.)[9]

In referring to defendants' failure to challenge the amount, the scope of coverage, or the appropriateness of the forms of the bonds in the *Donnelly* case, a failure quite like that of the defendants here, the district court stated:

> Any limitation in the scope of coverage or any inadequacy in the amount of these bonds has clearly been waived by the defendants. (*Donnelly Garment Co. v. International Ladies' Garment Workers Union*, 55 F. Supp. 572, 580 (W. D. Mo. 1944).)

Application of the above rules to the present case establishes that the court of appeals' opinion is in conflict with that of the Eighth Circuit, and that no precedent supports the brotherhood's recovery of attorneys' fees. In this case, as in *Donnelly*, the court did not require a bond conditioned to pay attorneys' fees. Even though it was ultimately concluded in the *Donnelly* case that the Norris-LaGuardia Act governed to preclude any injunction, the defendants were not allowed to recover attorneys' fees because the injunction

9. However, recovery of attorneys' fees was allowed on a bond given under Equity Rule 74 because it provided therefor. The attorneys' fees recoverable were limited to those in connection with the particular proceeding under which the bond was given and not the entire litigation.

bonds had not provided for them. That should be the result in the case at bar.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July , 1962.

APPENDIX A.

In the United States Court of Appeals

For the Seventh Circuit.

No. 13447 September Term, 1961—April Session, 1962.

Elgin, Joliet & Eastern Railway Company, *Plaintiff-Appellant*, v. Brotherhood of Railroad Trainmen, et al., *Defendants-Appellees*.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 4, 1962.

Before Duffy, Knoch and Kiley, *Circuit Judges*.

Duffy, *Circuit Judge*. This suit was brought against the Brotherhood of Railroad Trainmen (BRT), Brotherhood of Locomotive Firemen and Enginemen (BLFE) and Order of Railway Conductors and Brakemen (ORCB) to restrain a strike scheduled to commence at 6 a.m. on May 20, 1961. The District Court entered a temporary restraining order on May 19, 1961. This restraining order was continued in effect by agreement of the parties, pending final action by the District Court after a hearing on the merits.

On June 21, 1961, after the hearing on the merits, the District Court entered Findings of Fact and Conclusions of Law favorable to the defendants; the temporary restraining order was dissolved and the action was dismissed

at plaintiff's costs. Plaintiff forthwith filed a notice of appeal and moved for an injunction restraining defendants from striking pending said appeal. On June 22, 1961, the District Court granted plaintiff's motion for an injunction pending appeal stating that it did so pursuant to the provisions of Rule 62(c), F.R.C.P. "and the inherent powers of the Court." Defendant brotherhoods appealed from the order of June 22, 1961, granting the injunction pending appeal. These appeals have been designated in this Court as Nos. 13445 and 13447, and are being separately considered.

Plaintiff is a common carrier engaged in interstate commerce by railroad and is a "carrier" within the meaning of that term as defined in the Railway Labor Act. Plaintiff's railroad system connects and interchanges freight with thirty-three common carriers by rail which enter the city of Chicago. Its capital stock is owned by the United States Steel Corporation.

The defendant brotherhoods are labor organizations, national in scope, and are subject to the provisions of the Railway Labor Act. The BRT is exclusive bargaining representative for 1200 employees, the BLFE for 400 firemen and the ORCB for 55 road conductors.

The dispute between the parties concerns non-contributory pensions supplemental to Railroad Retirement Act benefits. A pension plan known as H-B had expired by its terms on October 31, 1959. This pension plan as well as a previous plan was included in collective bargaining agreements between plaintiff and each of the defendants, BRT, BLFE and ORCB, on behalf of the respective class or craft of plaintiff's employees represented by such labor organizations.

The brotherhood defendants sought pension benefits different from and in addition to those available under H-B.

On October 1, 1959, each brotherhood served notice on plaintiff pursuant to Section 6 of the Railway Labor Act. The notice was as follows:

> "Kindly consider this as a thirty (30) day notice under the provisions of Section 6 of the amended Railway Labor Act to extend the current Non-Contributory Pension Agreement [H-B] between the Elgin, Joliet and Eastern Railway Company and the [BRT, ORC&B, and BLFE] effective November 1, 1957, until such date when the United States Steel Workers reach an agreement on a Non-Contributory Pension Plan, after which date, the above referred to Organization[s] shall have the option of substituting the new pension plan (being negotiated by the United States Steel Workers) in place of the pension plan now in effect covered by the aforementioned pension agreement; and-or also have the option to renew, modify; or change the above referred to pension agreement as may be deemed advisable."

All three brotherhoods requested joint handling of their notices, and this procedure was followed between the plaintiff and the brotherhoods in the collective bargaining conferences which followed. Paul H. Verd, Vice President of plaintiff, was its principal negotiator. He offered to grant extensions of plan H-B for periods of three years, two years or one year, but refused to consider extensions for shorter periods as requested by the brotherhoods.

At the date of the service of the Section 6 notice, a strike was in progress called by employees of United States Steel. This strike was settled about January 1, 1960, and in the settlement it was agreed there would be changes in the non-contributory pension plan between United States Steel Corporation and its employees represented by United States Steel Workers. A copy of the new plan was not available to the brotherhoods representing plaintiff's employees for some months thereafter. This new plan was known as Plan H-CR and was not discussed by

Mr. Verd until the joint conference held on February 23, 1961.

During the collective bargaining conferences, the brotherhoods urged plaintiff to restore or increase benefits theretofore paid to retired employees of plaintiff. Mr. Verd was of the opinion that he was not required by the Railway Labor Act to bargain with employees of plaintiff concerning the pension plan sought by the brotherhoods. However, he did, in fact, bargain upon the plan.

Joint conferences with respect to the Section 6 notice were held on October 26 and 27, 1959, without an agreement being reached. Largely due to the steel strike, a third conference was not held until July 29, 1960. Again, no agreement was reached.

The brotherhoods then requested intervention of the National Mediation Board. On August 22, 1960, the Board advised plaintiff and the brotherhoods that it had taken jurisdiction. The first joint mediation session was held on November 30, 1960. No further meetings were held until February 23, 1961. The final joint mediation conference was held on February 27, 1961, but no agreement was reached.

On March 8, 1961, the National Mediation Board proffered arbitration. The plaintiff accepted, but on March 10, 1961, all of the brotherhoods jointly rejected arbitration.

By letters dated March 13 and March 16, 1961, mediation services were terminated by the Board. On April 14, 1961, plaintiff sent telegrams to officials of defendant brotherhoods requesting further conferences which were held on April 19, 21 and 24, 1961, without an agreement being reached.

On May 16, 1961, the Board, by telegram, advised all parties that defendants had authorized a strike to begin

May 20, 1961, at 6 a.m. and requested the brotherhoods to defer strike action. However, the brotherhoods refused to comply with this request. On May 18, 1961, at 10 p.m., the National Executive Officials of the three defendant brotherhoods posted a notice on plaintiff's property, giving authority for a strike effective Saturday, May 20, 1961, at 6 a.m.

Although plaintiff's brief lists twenty-eight separately stated "contested issues," we think the issues in this case may be considered under five subheads.

I

Plaintiff contends the strike scheduled for May 20, 1961, was illegal because the National Mediation Board had not completed its emergency mediation. Plaintiff argues the Mediation Board's request of May 16, 1961, for further meeting, started the running of a "reasonable time" during which the strike would be illegal. Plaintiff does not suggest what period of time would meet such a test. It does not contend that any second 30-day *status quo* period was involved. The District Court pointed out that the resumption of mediation was on the agreement that defendants did not waive their right to strike pursuant to notices already served. We hold this first contention of plaintiff must be overruled.

II

Plaintiff also contends that the demands of the defendant brotherhoods regarding pension agreements were not a subject of mandatory collective bargaining because not included within the phrase "rates of pay, rules, and working conditions" as those terms are used in Sections 2 First, 2 Seventh and 6 of the Railway Labor Act (45 U. S. C. 152, 156). As a corollary to this contention, plaintiff alleges

that the brotherhoods may not lawfully strike for increased non-contributory pensions for retired persons.

The Railway Labor Act does not specifically mention pension plans as a subject of mandatory collective bargaining. However, this Court, in *Inland Steel Co. v. NLRB*, 7 Cir., 170 F. 2d 247, construing similar language in the National Labor Relations Act, held that pension plans were properly the subject of mandatory collective bargaining. In spite of the difference in terminology between the National Labor Relations Act and the Railway Labor Act, we think the conclusion reached in the *Inland* case is applicable here. *McMullans, et al.* v. *Kansas, Oklahoma, and Gulf Railway Co., Inc., et al.*, 10 Cir., 229 F. 2d 50, 54-55.

We do not reach the contention that the brotherhoods may not lawfully strike for increased non-contributory pensions for retired persons. The District Court in its Findings of Fact stated, ". . . Neither the Section 6 Notices served by the labor organizations nor the strike ballots taken by them referred to retired employees. Officers of the BRT, ORCB, and BLFE never at any time threatened to strike against the plaintiff on account of the position of such retired employees. . . ." In the absence of a showing that such Findings of Fact were clearly erroneous (Rule 52(a), F. R. C. P.), this Court is bound by them and the issue of the lawfulness of a strike to obtain increased pension benefits for retired employees is, in fact, a moot question.

III

Plaintiff further contends that the scheduled strike was illegal in that the brotherhoods failed to make every reasonable effort to settle all disputes and did not accept arbitration.

Arbitration under the Railway Labor Act is voluntary, not compulsory. Section 7 First of the Railway Labor Act

(45 U.S.C. 157) provides in part: "That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise."

While it is possible that a refusal to arbitrate might be a factor in determining whether every reasonable effort was made to settle all disputes, the refusal to arbitrate in and of itself does not constitute a failure to make every reasonable effort to settle all disputes. To hold that the failure to arbitrate, *per se*, is the failure to exert every reasonable effort to make agreements and settle all disputes, would make a nullity of Section 7.

Plaintiff relies on *Brotherhood of Railroad Trainmen, Enterprise Lodge, No. 27, et al. v. Toledo, Peoria & Western Railroad*, 321 U.S. 50. The Supreme Court, in that case, held that Section 8 of the Norris-LaGuardia Act (29 U.S.C. 108) would bar a complainant from injunctive relief if he had not submitted the dispute to arbitration. The Court stated, at page 63:

> "Respondent's failure or refusal to arbitrate has not violated any obligation imposed upon it, whether by the Railway Labor Act or by the Norris-LaGuardia Act. No one has recourse against it by any legal means on account of this failure. *Respondent is free* to arbitrate or not, as it choses. But if it refuses, it loses the legal right to have an injunction issued by a federal court or, to put the matter more accurately, it fails to perfect the right to such relief. This is not compulsory arbitration. It is compulsory choice between the right to decline arbitration and the right to have the aid of equity in a federal court."

It must be conceded that the language used by the Court, " . . . and the right to have the aid of equity in a federal court" is very broad. However, construing it in context with the other language used in the paragraph

hereinbefore quoted, we hold Section 8 is not applicable to the brotherhoods in the case at bar. The brotherhoods were not seeking injunctive relief and failure to arbitrate did not violate the Railway Labor Act.

The application of Section 4 of the Norris-LaGuardia Act (29, U.S.C. 104) is not affected by the failure of the brotherhoods to arbitrate. Section 4 is applicable to the dispute under consideration and it operates so as to prevent the granting of injunctive relief to plaintiff.

We hold that plaintiff's argument that defendant brotherhoods failed to make every reasonable effort to settle the dispute, is without merit.

IV

Plaintiff argues that conduct which violates the provisions of the Railway Labor Act may be enjoined in spite of the Norris-LaGuardia Act. However, it is admitted by plaintiff that the disputed question is a "major dispute." The Supreme Court has held that Section 4 of the Norris-LaGuardia Act is applicable to "major disputes" within the meaning of the Railway Labor Act. *Order of Railroad Telegraphers, et al. v. Chicago & North Western Railway Co.*, 362 U.S. 330.

This question needs no further discussion here. Plaintiff's argument is based upon the proposition that the brotherhoods' conduct in this case violated the Railway Labor Act. We have held to the contrary. We hold the District Court was correct in holding that it was deprived of jurisdiction to issue an injunction by reason of the provisions of the Norris-LaGuardia Act.

V

Plaintiff urges error on the part of the trial court in awarding attorney's fees to the defendant brotherhoods. We find this contention to be without merit. Section 7 of the Norris-LaGuardia Act (29 U.S.C. 107) provides in part:

> "No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court."

There was no error in the awarding of attorney's fees to the defendant brotherhoods.

We have considered all of plaintiff's contentions and find them to be without merit.

The judgment of the District Court is

AFFIRMED.

UNITED STATES COURT OF APPEALS,

For The Seventh Circuit,

Chicago 10, Illinois.

Friday, May 4, 1962.

Before

Hon. F. Ryan Duffy, *Circuit Judge*,
Hon. Win G. Knoch, *Circuit Judge*,
Hon. Roger J. Kiley, *Circuit Judge*.

Elgin, Joliet and Eastern Railway Company *Plaintiff-Appellant*, No. 13444 *vs.* Brotherhood of Railroad Trainmen, et al., *Defendants-Appellees*.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court entered therein on June 21, 1961, in this cause appealed from be, and the same is hereby, affirmed with costs, in accordance with the opinion of this Court filed this day.

APPENDIX B.

Section 1 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 70, 29 U.S.C., § 101, provides:

> That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

Section 4 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 70, 29 U.S.C., § 104, provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Section 5 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat 71; 29 U.S.C., § 105, provides:

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in Section 4 of this Act.

Section 7 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 70, 29 U.S.C., § 107, provides:

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no

injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That, as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however*, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erro-

neous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Section 9 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 70, 29 U.S.C., § 72, provides:

No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

Section 13 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 70, 29 U. S. C., § 113, provides:

SEC. 13. When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of

a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment; regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

Section 1; Fifth, of the Railway Labor Act as amended, 44 Stat. 577, 48 Stat. 1185, 49 Stat. 1189, 54 Stat. 785, 45 U. S. C., § 151, Fifth, provides:

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however*, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission. The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Section 2 of the Railway Labor Act as amended, 44 Stat. 577, 48 Stat. 1185, 45 U. S. C., §§ 151a and 152, provides:

SEC. 2. Section 2 of the Railway Labor Act is amended to read as follows:

"GENERAL PURPOSES

"(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to

provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

"GENERAL DUTIES.

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of

its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

"Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as

otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

"Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Media-

tion Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

"Tenth. The willful failure or refusal of any carrier, its officers, or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor or

service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service without his consent.

"Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any

individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

"(c) The requirment of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided,* however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

"(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended."

Section 5 of the Railway Labor Act as amended, 44 Stat. 577, 48 Stat. 1185, 62 Stat. 991, 63 Stat. 107, 45 U. S. C. § 155, provides:

SEC. 5. Section 5 of the Railway Labor Act is amended to read as follows:

"FUNCTIONS OF MEDIATION BOARD.

"SEC. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts

have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

"Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

"Third. The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 7 of this Act:

"(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 7 of this Act, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the board name an arbitrator or arbitrators not so disinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

"If an arbitrator named by the Mediation Board, in accordance with the provisions of this Act, shall be removed by such Board as provided by this Act, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly to select another arbitrator in the same manner as provided in this Act for an original appointment by the Mediation Board.

"(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to arbitrate under this Act. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a circuit court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board to be filed in its office.

"(c) When an agreement to arbitrate has been filed with the Mediation Board, or with one of its members, as provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the parties to the controversy, it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

"(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such recon-

vened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitrator shall be named in the same manner and with the same powers and duties as such original arbitrator.

"(e) Within sixty days after the approval of this Act every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact including also a statement of the rates of pay, rules and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

"(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession."

Section 6 of the Railway Labor Act as amended, 44 Stat. 577, 48 Stat. 1185, 45 U. S. C., § 156, provides:

> SEC. 6. Section 6 of the Railway Labor Act is amended to read as follows:
>
> "SEC. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

APPENDIX C.

Company	Employees	Effective Date	By whom established
The Pullman Co.	7,729	July 1, 1947	Bd. of Directors
Wabash R. R. Co.	888	Jan. 1, 1955	Bd. of Directors
Reading Co.	561	May 1, 1954	Bd. of Directors
Southern Pacific Co.	43,186	Jan. 1, 1903	Bd. of Directors.
Norfolk & Western Railway Co.	11,437	Dec. 1, 1938	Company
Chicago, Rock Island & Pacific R. R. Co.	800	July 1, 1940	Company
Chesapeake & Ohio Ry. Co.	3,087	June 1, 1946	Company
Santa Fe Railway	5,263	Oct. 1, 1953	Company
The Baltimore & Ohio	25,744	Mar. 1, 1953	Company
Seaboard Airline R. R. Co.	1,092	Jan. 1, 1956	Company
Illinois Central R. R.	31,796	July 1, 1901	Bd. of Directors
Southern Pacific Transport Co.	520	July 2, 1930	Bd. of Directors
Chicago, Burlington & Quincy R. R. Co.	2,482	Jan. 1, 1952	Company
Southern Railway	2,774	June 1, 1953	Company
Railway Express Agency, Inc.	4,031	Sept. 26, 1929	Company
New York Central R. R.	55,185	Nov. 1, 1946	Company
Union Pacific R. R. Co.	1,968	Jan. 1, 1903	Company
Northern Pacific Ry. Co.	1,694	Oct. 1, 1937	Company
Missouri Pacific	not stated	Jan. 1, 1947	Company
Chicago, Milwaukee St. Paul & Pacific R. R. Co.	674	July 1, 1943	Trustees of the R.R.
St. Louis-San Francisco Ry. System	874	Aug. 1, 1953	Company
Chicago & North Western	19,400	Jan. 1, 1901	Bd. of Directors
New York, New Haven & Hartford R. R. Co.	494	Jan. 31, 1951	Bd. of Directors
New York Central	13,603	Nov. 1, 1946	Company
Southern Pacific-Texas & New Orleans R. R. Co.	11,461	Jan. 1, 1903	Bd. of Directors
Erie R. R. Co.	3,447	Jan. 1, 1945	Company
Great Northern Ry Co.	1,408	Sept. 16, 1916	Company